

Supreme Court, U.S.

FILED

SEP 18 1990

JOSEPH F. SPANOL, JR.
CLERK

No. 90-319

In The
Supreme Court of the United States
October Term, 1990

PHYLLIS ZAGANO,

Petitioner,

-against-

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Respondents.

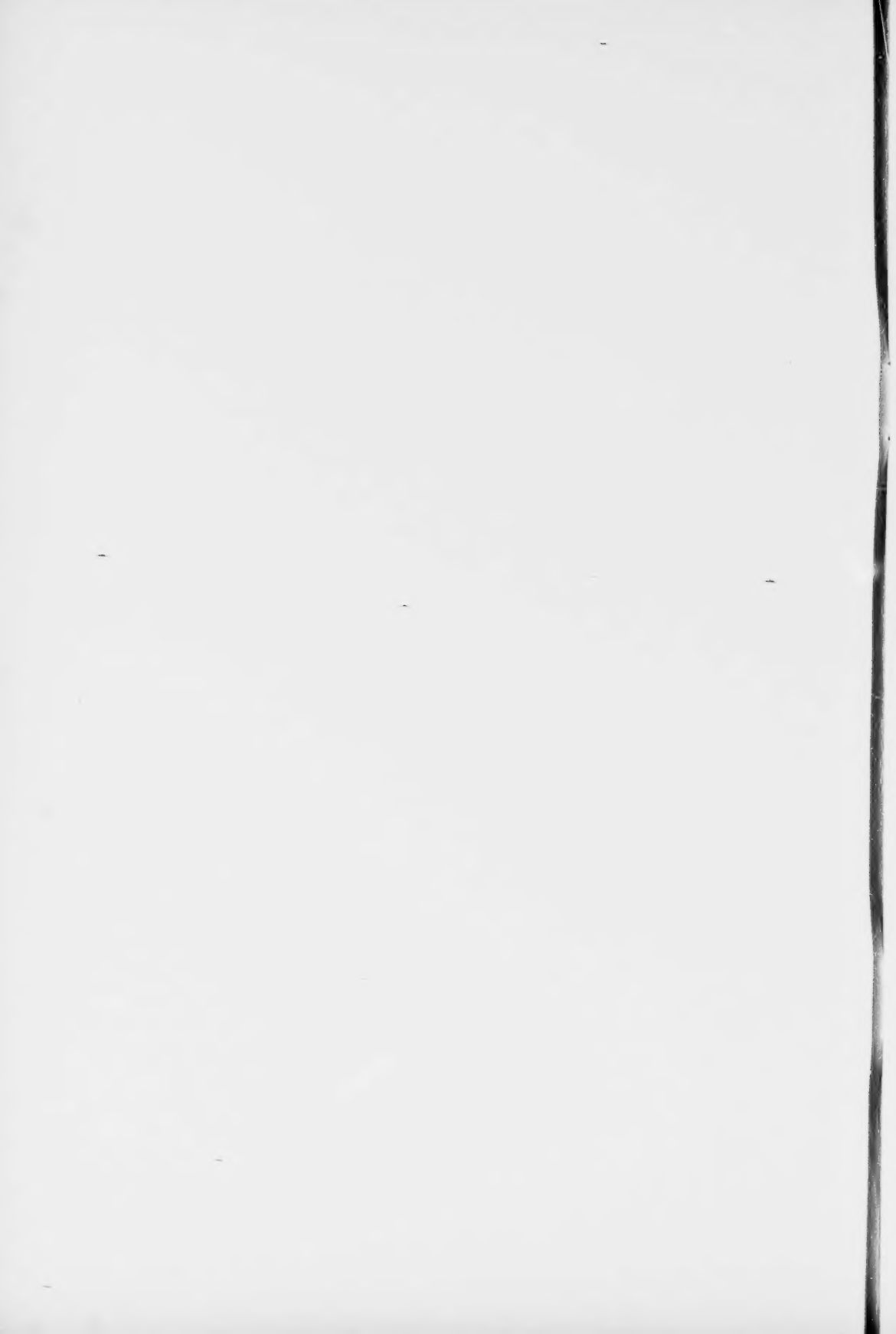
On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Second Circuit

BRIEF OF FREE SPEECH ADVOCATES AND
PRESSWATCH AS *AMICI CURIAE* IN SUPPORT
OF THE PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

PHYLLIS ZAGANO,)	
)	
Petitioner,)	Docket No. 90-319
)	
v.)	MOTION FOR LEAVE
)	TO FILE BRIEF
FORDHAM UNIVERSITY)	AMICUS CURIAE
and GEORGE N. GORDON,)	
)	
Respondents.)	

Free Speech Advocates, of New Hope, Kentucky, and Presswatch, of Needham, Massachusetts, respectfully move for leave to file the annexed brief as amici curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused.

The interest of movants in this case arises from their special concern for the preservation of the right of parties

involved in disputes to use their right of speech to enlist others in aid of their cause. In its decision, the United States District Court emphasized what it called "Dr. Zagano's various highly inflammatory letters to Fordham alumnae and friends." Petition for Writ of Certiorari, 9a. Those letters were solicitations of verbal and moral support by or on behalf of the impecunious petitioner who had been arbitrarily terminated from her teaching position and who found herself without financial resources to defend herself against the university and its law firm. Movants are engaged in the defense, in the public forum and in litigation, of precisely the sort of financially overmatched free speech litigants typified by petitioner. Movants deplore the district court's use of petitioner's efforts, and the efforts of

others on her behalf, to raise money to finance her defense of her career as a factor in determining the outcome of the litigation in which she engaged. If this precedent is allowed to endure, the defense of free speech and related rights in litigation will become even more clearly an enterprise for the wealthy and well-funded than it is today.

In addition, this case involves a federal court's interference with state administrative proceedings. Movants are concerned with the preservation of such avenues in cases involving free speech and related rights. Here, especially, petitioner's (and others') exercise of

free speech rights resulted in an
improper injunction of State proceedings.

Dated: September 14, 1990

Respectfully submitted,

Charles E. Rice
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No. 90-319

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PHYLLIS ZAGANO,

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FORDHAM UNIVERSITY and
GEORGE N. GORDON,

Respondents.

BRIEF OF FREE SPEECH ADVOCATES AND
PRESSWATCH AS AMICI CURIAE IN SUPPORT
OF THE PETITION FOR A WRIT OF
CERTIORARI

Pursuant to Rule 37.2 of the Rules
of this Court, Free Speech Advocates
and Presswatch submit this brief as
amici curiae in support of the petition
for a writ of certiorari to the United
States Court of Appeals for the Second
Circuit.

INTEREST OF AMICI CURIAE

Free Speech Advocates is a legal defense group dedicated to protecting, preserving and defending the right of public witness and speech on interests of public concern.

Presswatch publishes a fortnightly newsletter that advocates balanced treatment in the media of public issues. Presswatch is also concerned in this case of the treatment of a university professor, who, it appears, was unlawfully discriminated against on the basis of her involvement in "Catholic matters and affairs."

Free Speech Advocates and Presswatch each have a special interest in the safeguarding of the First Amendment rights of those persons who, as litigants, exercise

such rights in advocating their causes and enlisting others in support of such causes. Such exercise should not be permitted to factor into a court's determination either of the merits of a litigant's case or of a litigant's procedural rights. In this case, it is the view of these amici that the courts below impermissibly abridged petitioner's First Amendment rights, in effect penalizing petitioner for the exercise of such rights and chilling the exercise of such rights by others. Specifically, the decisions of the courts below in this case, as grounds for dismissal of the petitioner's claims with prejudice, cited various communications by petitioner (and others) in support of her cause as a basis to deny her the opportunity to present her claims. It

is submitted that the use of such constitutionally protected communications as a significant, if not deciding, factor to deny petitioner any forum to determine her claims was an impermissible encroachment on petitioner's First Amendment rights, as well as a denial of due process of law.

-----x-----

STATEMENT OF THE CASE

In this case, petitioner, Phyllis Zagano, requested that the district court, where she had filed a Title VII action, dismiss her case without prejudice so that ongoing, prior proceedings brought by and before a State agency, the New York State Division of Human Rights, could be

completed. These proceedings, in which the State was the complainant, arose from the same acts of discrimination and retaliation as underlied petitioner's federal action. The State proceeding -- which had been commenced first, in which probable cause had been found that discriminatory and retaliatory acts took place, and in which practically all of the State's case had been heard -- entailed a significantly broader spectrum of remedial action (not limited to private relief) than the federal action. Rather than permitting the State proceedings to be completed, the district court not only denied petitioner's motion for voluntary dismissal, but enjoined altogether the State proceeding, depriving Prof. Zagano (and the State) of any forum to determine serious and merito-

rious claims of discriminatory and retaliatory acts by Fordham University and its department chairman, George N. Gordon.

What is of greatest concern to these amici is that a significant, if not deciding, factor in the determinations of the district court and the court of appeals was Prof. Zagano's communications in support of her cause directed at persons whose support, financial and otherwise, Prof. Zagano sought to engage, and communications between and among third parties in support of Prof. Zagano.

-----x-----

SUMMARY OF ARGUMENT

This Court should grant the petition for a writ of certiorari because the decision of the district court, as affirmed by the Second Circuit, impermissibly abridges litigants' First Amendment rights, inasmuch as a significant, if not deciding, factor in denying petitioner's motion for voluntary dismissal, as well as dismissal with prejudice and injunction of independent State proceedings, was the exercise of petitioners' (and others') free speech rights.

-----x-----

ARGUMENT

I. Certiorari Should Be Granted Because the Standards For Denying Voluntary Dismissal and Enjoining Ongoing State Proceedings Implicit in the Decisions Below Impermissibly Abridge Litigants' First Amendment Rights.

While purporting to invoke certain "factors" for voluntary dismissal set forth in a Magistrate's decision from the Eastern District of New York,¹ the district court primarily relied on its negative views of certain letters that Prof. Zagano had written over time to various persons seeking support for her cause,² and even more, on letters by

¹Bosteve Ltd. v. Marauszski, 110 F.R.D. 257 (E.D.N.Y. 1986) (Scheindlin, Mag.).

²Prof. Zagano's letters, modest in number, were written to selected alumni of Fordham University and others with interest in the issues involved in the case, to raise funds for legal expenses in

third parties commenting unfavorably on the public position Fordham University had taken in the controversy. Referring to such third party letters (A 1-11),³ the district court stated "as I skimmed through the various letters that [Fordham] President O'Hare has annexed to his affidavit, you certainly get a strong flavor, arguably, of vexatiousness." (A 23)

Having introduced this notion, the district court then unfairly leapt to the conclusion that "the lawsuit has certainly

support of her cause and to gather moral support. The letters, while written with zeal, were factually accurate and not inflammatory.

³Parenthetical references preceded by "A" are to the Appendix to this brief, while parenthetical references followed by "a" are to the appendix to the petition. All matters in the Appendix hereto are from the joint appendix before the Court of Appeals for the Second Circuit.

turned into an instrument of vexation in the hands of the plaintiff with these letters that are being written to alumni . . . all of it harassing and almost an extortive kind of measure from their face" (2a) The record of the case is quite clear, however, that the district court was not basing this view on letters written by Prof. Zagano, but rather, letters written by third parties.

In particular, in support of its conclusions, the district court cited a letter by someone affiliated a non-profit family-life organization (The Couple to Couple League International Inc.) to a Richard J. Bennett (apparently a former trustee of Fordham University) expressing the author's views on the Zagano controversy. (A 15-17) The district court's tersely stated view of this (third-party) letter was "That stinks." (A

28) Then, the court concentrated on another letter offered by respondents' counsel from a Rev. Patrick A. Heelan, S.J. to a fellow Jesuit priest, Rev. Vincent Potter, S.J., which quite bluntly expresses Heelan's personal views on the controversy. (A 35-36) Though this letter was written by a non-party, the court became highly exercised over it, attributing it to Prof. Zagano: "He [the author] is obviously not writing this having made it up out of thin air. This is not rain that fell on his head, somebody gave him this information." (A 29)

The district court used these letters against Prof. Zagano as a basis to dismiss her action. Indeed, in this regard, the court stated: "[T]his is relevant, it seems to me, if credited, on the issue of whether or not Dr. Zagano has a right at this point to drop this suit and walk away

from it without cost to her but a terrible cost to you [respondents], and it is certainly some evidence -- Voltaire, vexatious as he might have wanted to have been, would have recognized that this [the Heelan letter] is defamatory, and therefore not privileged by the First Amendment." (A 30) Further, the court made repeated, and indiscriminate, reference to the various letters in connection with its decision: "Now, these letters to the trustees, to the alumni, to the president,⁴ to Mr. Heelan asking him to write further⁵ -- . . . I assume there

⁴There were no letters by Prof. Zagano to the president or trustees of Fordham (or to any faculty, as the court elsewhere stated in error (25a)) regarding the controversy.

⁵There were no letters by Prof. Zagano to "Mr. [sic] Heelan asking him to write further." This was conjecture by the district court.

was an accompanying letter saying,
'Patrick [Heelan], write me a letter, do
me a favor.' [The letter] creates a cir-
cumstantial prima facie case that she is
using the publicity of this to further her
goals in what we all could conclude, if we
get down to Heelan's letter, is a wholly
impermissible way. You don't go around
calling the adversary lawyer a liar and
this and that and the other."⁶ (A 32;
see also 3a ("I read these letters to the
university about how 'I am going to give
money to her defense fund and therefore
cut it back from my usual gift to the
University', based upon her very provoca-
tive mailings, even if justified, to alum-
ni and trustees," referring to yet another

⁶Evidently Fr. Heelan expressed his
doubts concerning the credibility of one
of Fordham's attorneys as to the cause of
delay in the State proceedings.

third party letter.))

It is offensive to any First Amendment consideration that a court may use communications by third parties, let alone communications by a party, as the basis to label a litigant as "vexatious" and thereby deny voluntary dismissal and dismiss that litigant's case with prejudice, without any trial, and enjoin independent State proceedings.

The district court's adverse reaction to the various letters sympathetic to Prof. Zagano's cause was also in apparent disregard of the context in which those letters were written. In its glancing review, the district court failed to take into account the fact that the Zagano non-reappointment, Prof. Gordon's notorious Screw publications, and Fordham's publicly-proclaimed defense of "a tenured faculty member's decision to publish in

Screw" as "an exercise of academic freedom" had long since been the subject of emotional intra-Fordham and public debate and controversy. On its part, Fordham never shied from espousing its own position through the media. Indeed it appears that any letter-writing was precipitated by Fordham's president writing early on to National Review about the controversy. J.A. O'Hare, S.J., "Fordham Fracas II", National Review, Sept. 20, 1985, at 9 (letter to editor asserting Prof. Zagano's case to be without foundation and stating that a tenured faculty member's decision to publish in Screw "could and would be defended as an exer-

cise of academic freedom.") (A 1-11)⁷

(Prof. Zagano was responding precisely to

⁷"Dr. Phyllis Zagano's Quarrel with Fordham University," (statement issued by the Office of the President of Fordham defending the merits of its position) (Sept. 1987) (A 18-22); see also, e.g., F. Canavan, S.J., "Fordham Fracas", National Review, Aug. 23, 1985, at 6 (letter to editor by Fordham political science professor); J.A. O'Hare, S.J., "Commentary on Fordham 'reckless'", Waterbury Republican, Sept. 25, 1985 (letter to editor by Fordham president regarding Zagano controversy); J. Frawley, At Fordham Controversy Still Simmers Around Prof, National Catholic Register, Nov. 25, 1985, at 1, 12, 13 (statements by Fordham political science professor (F. Canavan, S.J.), chairman of Communications Department (T. Curran), vice president for academic affairs (R. Doyle, S.J.), communications professors (R. Dengler, S.J., G. Gordon and J. Phelan) and president (J.A. O'Hare, S.J.)); E. Maillet, Fordham Case Pits Sleaze Against Scholarship: Academic Freedom But for Whom?, Eastern Oklahoma Catholic, Oct. 26, 1986, at 5, 18 (statement by Fordham president (J.A. O'Hare, S.J.)) and The Ram (Fordham publication), Apr. 18, 1985, at 1, 7, May 2, 1985, at 1, March 20, 1986, at 1 (statements by Fordham's president, executive vice president, defendant Gordon, sociology professor and Fordham's attorney).

that issue in the letters that the district court labelled "vexatious.")

It is indeed ironic that the district court chose to castigate one party for supposed participation in a sometimes-heated public controversy, but disregarded the fact that the other party (Fordham) had turned the controversy into a "media event" by repeated public airing of its position. As repugnant as the use of the exercise of free speech is as a factor determining a litigant's right to voluntary dismissal, it is even more repugnant when the other side to the controversy is somehow regarded as exempt from similar scrutiny, as appears to have been the case here. It is precisely the point of the First Amendment to protect this type of speech, so that controversial speech will not be silenced in a free society.

The district court's dismissal with prejudice did not end the district court's imposing penalties for the exercise of First Amendment rights by Prof. Zagano and others. The district court also used this as a factor in enjoining the State proceedings, cynically stating in its injunction decision that "Dr. Zagano's various highly inflammatory letters to Fordham alumnae [sic] and friends demonstrate that the mere existence of any pending lawsuit gives her -- as she sees it -- the right to continue such communications." (9a) It is not the existence of a lawsuit that gave Prof. Zagano the right to communicate about the controversy. It is the Constitution that gave her such right.

The district court then used an injunction to silence Prof. Zagano. Ironically, the court thus denied Prof. Zagano (and

the State) the only remaining forum for resolving the controversy on its merits.

While the Second Circuit did not dwell upon the various letters to the degree that the district court did, it fully acquiesced in the district court's reasoning and noted in its affirmance that "Zagano had carried on a campaign seeking public support for her cause, including numerous communications to Fordham alumni and others, many of whom contacted Fordham officials on her behalf Near the time of the January [1989] conference she also led at least one supporter to believe that while she was eager to go to trial in the federal case, defendants' counsel was engaged in delaying tactics to avoid such a trial and to run up exorbitant legal bills." (18a-19a) (The court of appeals' reference to Prof. Zagano's supposed action appears to be conjecture on its

part.) The court of appeals also acquiesced in the district court's conclusion (based on its antipathy toward the various letters) that "the action was an 'instrument of vexation' against Fordham." (19a) The court of appeals was equally content to permit legitimate exercise of First Amendment rights to factor into, if not determine, a voluntary dismissal motion, a dismissal with prejudice without a trial, and a wholesale injunction of proceedings by the State, thereby denying a last chance at final resolution on the merits.

These amici urge the Court to grant certiorari to review the precedents set by the district court and the court of appeals, which precedents are antithetical to the First Amendment rights of litigants. This case would enable a federal court to ~~determine~~ motions under Fed.

R. Civ. P. 41 on the basis not only of a litigant's communications in support of his or her case, but on the basis of the communications of third parties, to the severe detriment of the litigant, including the loss of substantive rights.

CONCLUSION

Free Speech Advocates and Presswatch, as amici curiae, respectfully request this Court to grant the petition for a writ of certiorari to review the action taken by the courts below which was impermissibly based in significant part on the exercise by petitioner (and others) of rights secured by the First Amendment, and also because the courts below unfairly denied petitioner any forum to resolve meritorious claims and improperly enjoined State proceedings, in which the State was

complainant, in an unlawful interference with the State's police power.

Dated: September 14, 1990

CHARLES E. RICE
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Free Speech Advocates and
Presswatch, Amici Curiae
Notre Dame Law School
Notre Dame, Indiana 46556
(219) 239-5667

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PHYLLIS ZAGANO LEGAL FUND
Box 248 FDR STATION
NEW YORK, NEW YORK 10150

Dear Fordham Alumnus:

Fordham University says it is not a Catholic school. It is a Jesuit school. Maybe that's why its new President, Joseph A. O'Hare, S.J. dares to defend a faculty member who attacks decency and religion in pornographic magazines.

When I was an assistant professor of communications at Rose Hill, my chairman, George N. Gordon, wrote blasphemously in SCREW, the weekly anti-Catholic tabloid of pornography that "Jewish liberals shall all feel guilty, because only one who ever lived had a mother who was a virgin."

Father O'Hare finds this acceptable and defensible under "academic freedom." He's said so -- in National Review magazine (Sept. 20, 1985, p. 9). I am sure you agree with me that it is not. George Gordon's anti-religious statement above is just one example of many from his writings, including his writings in SCREW magazine which continued well after he told me I would not be reappointed to the faculty of Fordham because I was, in his words, "too involved in Catholic matters and affairs" and "some don't like it."

Official Fordham may not like faculty

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members involved in Catholic affairs, but I am sure you do. At great saving of time and money, I could have abandoned the principle and walked away. But I have filed a suit in Federal court to ask for reinstatement and compensation. Will you join me in this effort to make Fordham reaffirm itself as Catholic? I need help with my legal expenses to pursue this principled case, and anything you send me will be used for that purpose only. What you send Fordham this season will help defend George Gordon.

Please, let's both help Fordham be Fordham.

Sincerely,

/s/ Phyllis Zagano
Phyllis Zagano

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PHYLLIS ZAGANO LEGAL FUND
Box 248 FDR STATION
NEW YORK, NEW YORK 10150

212 755-0051

December 1, 1986

Dear Bishop:

By now you have no doubt heard that when I was an assistant professor of communications at Fordham University my chairman, George N. Gordon, was writing editorials in SCREW, the weekly anti-Catholic tabloid of hard core pornography. During the summer of 1983 Gordon told me I would not be reappointed to the communications faculty because I was, in his words, "too involved in Catholic matters and affairs," and "some do not like it." Shortly after, he wrote in SCREW magazine that "Jewish liberals shall all feel guilty because only one who ever lived had a mother who was a virgin."

This shocking attitude is underscored by the fact that part of my "too Catholic" "matters and affairs" was my academic research into the media's reaction to the 1983 NCCB letter on war and peace. In fact, I've used a mailing label prepared for that study to write to you today. At great saving of time and money, I could have abandoned the principle and walked away. But I have filed a civil suit in Federal court to ask for reinstatement

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and compensation. Will you join me in this effort to restore values to education? I would clearly prefer to be back full time at my academic research, but I need help with my legal expenses to pursue this principled case.

Sincerely,

Phyllis Zagano

P.S. In a separate action, the New York State Division of Human Rights has found "probable cause" that Fordham discriminated against me because of my sex and religion, and will soon order a public hearing on the matter.

PHYLLIS ZAGANO LEGAL FUND
Box 248 FDR STATION
NEW YORK, NEW YORK 10150

Dear Member of the President's Club:

I am told that at a recent President's Club meeting, Mr. Richard Bennett, in response to a question about my situation as regards Fordham, said in substance "We took care of that a long time ago." I am writing to tell you that this is inaccurate.

As you may know, when I was an assistant professor of communications at Fordham University my chairman, George N. Gordon, was writing editorials in SCREW, the weekly anti-Catholic tabloid of hard core pornography. During the summer of 1983 Gordon told me I would not be reappointed to the communications faculty because I was, in his words, "very much engaged in Catholic matters and affairs," and "some do not like it." My department had voted 2 against and 3 abstain on the matter of my reappointment. Shortly after, he wrote in SCREW magazine that "Jewish liberals shall all feel guilty because only one who ever lived had a mother who was a virgin." As you probably know, obscene pornography is not protected speech under the First Amendment. I personally brought Gordon's writing to the attention of a Fordham administrator in September, 1983, yet Gordon continued as department chairman. In fact, he continued to write in SCREW. Please be advised that Gordon is still at

Fordham.

The Fordham president who presided over my final days at Fordham, Joseph A. O'Hare, S.J. has written that Gordon's SCREW statements "could and would be defended as a right of academic freedom" (National Review, Sept. 20, 1985, p. 9). He is presently circulating a statement which argues in part that "another Catholic woman" was recommended for tenure "at approximately the same time." Yet the woman received tenure well after I filed my 3 internal grievances (one of which -- on the matter of a Merit Raise -- was upheld by the Faculty Grievance Committee).

At great saving of time and money, I could have abandoned the principle and walked away. After extensive investigation, the New York State Division of Human Rights found "probable cause" that Fordham discriminated against me because of my sex and religion, and in March, 1986 ordered a public hearing. Fordham has caused such unreasonable delays that this hearing on the State's findings will not begin until October 26, 1987, if then. Fordham has also been delaying its provision of witnesses to the U.S. Department of Labor, which is conducting a separate investigation under Title 38 USC.

I have also filed a civil suit in Federal court to ask for reinstatement and compensation, and a number of loyal alumni have assisted me in this effort. I need help with my legal expenses to pursue this principled case, and I need responsible individuals to continue

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speaking the truth about this situation.
Anything you can do to help me will no
doubt help build a better Fordham.

Sincerely,

/s/Phyllis Zagano

PHYLLIS ZAGANO LEGAL FUND
Box 248 FDR STATION
NEW YORK, NEW YORK 10150

Dear Fordham Alumnus:

As you may know, when I was an assistant professor of communications at Fordham University my chairman, George N. Gordon, was writing editorials in SCREW, the weekly anti-Catholic tabloid of hard core -- that is, legally obscene -- pornography. During the summer of 1983 Gordon told me I would not be reappointed to the communications faculty because I was, in his words, "very much engaged in Catholic matters and affairs," and "some do not like it." Shortly after, he wrote in SCREW magazine that "Jewish liberals shall all feel guilty because only one who ever lived had a mother who was a virgin." I brought this to the attention of a Fordham administrator in September, 1983, yet Gordon continued as department chairman and continued to write in SCREW. He is still at Fordham.

The Fordham president who presided over my final days at Fordham, Joseph A. O'Hare, S.J. has written that Gordon's SCREW statements "could and would be defended as a right of academic freedom" (National Review, Sept. 20, 1985, p. 9). As you probably know, obscene pornography is not protected speech under the First Amendment.

My case against Fordham is so clear that the New York State Division of Human Rights, after extensive investigation, found "probable cause" that Fordham

discriminated against me because of my sex and religion, and in March, 1986 ordered a public hearing. Fordham caused such unreasonable delays that the State did not begin to present its findings until October 26, 1987, when the Fordham attorney objected strongly to the presence of onlookers. At a public hearing!!! The public hearing continued on January 7, 1988, but Fordham requested and obtained cancellation of the second hearing day. When my attorney was unavoidably delayed on April 6, Fordham first asked to cross-examine me without him present, and then tried to have the entire hearing day cancelled. Fordham did cancel half of the May 6 hearing, but despite Fordham's delays, a hearing is scheduled for June 17, 1988. Please join me then on the 10th Floor of 55 West 125th Street, New York City, beginning at 10:00 a.m.

Fordham has also been quite uncooperative in the U.S. Department of Labor's separate investigation under Title 38 USC, regarding the Fordham Communication Department's objection to my Naval Reserve commission.

I have also filed a civil suit in Federal court to ask for reinstatement and compensation, and may alumni have assisted me in this effort. I need help with my legal expenses to pursue this principled case, and I need responsible individuals to continue speaking the truth about this situation. Anything you can do to help me will no doubt help build a better Fordham.

Sincerely,
/s/ Phyllis Zagano

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PHYLLIS ZAGANO LEGAL FUND
Box 248 FDR STATION
NEW YORK, NEW YORK 10150

Dear Fordham Alumnus:

When I was an assistant professor of communications at Fordham University my chairman, George N. Gordon, was writing editorials in SCREW, the weekly anti-Catholic tabloid of hard core -- that is, legally obscene -- pornography. In July, 1983 Gordon told me I would not be reappointed to the communications faculty because I was "very much engaged in Catholic matters and affairs," and "some do not like it." Shortly after, he wrote in SCREW magazine that "Jewish liberals shall all feel guilty because only one who ever lived had a mother who was a virgin." I brought this to the attention of a Fordham administrator in September, 1983, yet Gordon continued as department chairman and continued to write in SCREW. He is still at Fordham.

The Fordham president who presided over my final days at Fordham, Joseph A. O'Hare, S.J., has written that Gordon's SCREW writings "could and would be defended as a right of academic freedom" (National Review, Sept. 20, 1985, p. 9). As you probably know, obscene pornography is not protected speech under the First Amendment.

My case is so clear that the New York State Division of Human Rights, after extensive investigation, found "probable cause" that Fordham discriminated against me because of my sex and religion, and in

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March, 1986 ordered a public hearing. Fordham caused such unreasonable delays that the State did not being to present its findings until October 26, 1987, when the Fordham attorney objected strongly to the presence of onlookers. At a public hearing!!! The public hearing has continued, but so have Fordham's delaying tactics. Despite the delays, hearings are scheduled for March 9 & 10 and April 6 & 7, 1989. Please join me then on the 10th floor of 55 West 125th Street, New York City, beginning at 10:00 a.m.

I have also filed a civil suit in Federal court to ask for reinstatement and compensation, and many alumni have assisted me in this effort. I need help with my legal expenses to pursue this principled case (to my mind, Fordham has not explored settlement possibilities in good faith) and I need responsible individuals to continue speaking the truth about this situation. If you cannot assist me financially, perhaps you could contact Thomas F. X. Mullarkey, the Chairman of the Fordham Board of Trustees, to express your opinion on this matter. Anything you can do to help me will no doubt help build a better Fordham.

Sincerely,
/s/Phyllis Zagano

Thomas F.X. Mullarkey, Esq., FCO'54,
LAW'59
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FAX 212-974-2825

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October 6, 1988

Mr. Thomas F.X. Mullarkey, Esq.
FCO'54, LAW '59
Lazard Freres & Co.
1 Rockefeller Plaza
New York, New York 10020

Dear Mr. Mullarkey:

I am sure you are aware of the information Phyllis Zagano has sent to Fordham alumni.

I realize the facts as presented by Ms. Zagano are one sided and I was inclined to ignore them. However, eight years of Jesuit training prevailed and I find it necessary to at least question the institution that has occupied a special place in my heart since before I entered the Prep in 1942.

I cannot find fault with an administration that allows George Gordon to teach at Fordham, even if Ms. Zagano's charges are true. I suppose I would have to question a decision that moved anyone with those "credentials" to a position of power.

Of far greater importance to me are the charges that Ms. Zagano was discriminated against on the basis of sex (I have eight daughters) and that somehow she was discriminated against for being an active Catholic. I also find it unbelievable

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that the Fordham I knew would object to a woman holding a Naval Reserve Commission.

At first blush the charges seem ludicrous and absurd. However, as a faithful alumnus I must ask for some sort of explanation of the situation. I would feel foolish splitting next year's donation between Fordham and Phyllis Zagano's legal fund.

Yours very truly,

AMDG

P.S. I am glad it is you and not I that has to read these letters.

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ECUMENICAL CHRISTIAN MINISTRIES, INC.
THE ECUMENICAL CAMPUS CENTER
SIXTH AND ELM, HAYS, KANSAS 67601

"Protestant Ministry Serving the Campus
Community of Fort Hays State University"

October 4, 1988

Thomas F. X. Mullarkey, Esq.
Lazard Freres & Co.
1 Rockefeller Plaza
new York, NY 10020

Dear Mr. Mullarkey:

As a friend of Phyllis Zagano I respectfully ask that you exercise your authority as Chairman of the Board of Fordham University to resolve as expeditiously as possible the protracted dispute between Dr. Zagano and the University. Although I am acquainted with this matter only from Dr. Zagano's perspective, I can assure that continued foot-dragging tactics do not enhance the perception of Fordham as an institution that respects and pursues truth wherever it may lead.

I have enclosed a statement I prepared on Dr. Zagano's behalf. Thank you for your consideration and for your willingness to make appropriate interventions.

Very truly yours,

cc: Phyllis Zagano

A15

The Couple to Couple League
International, Inc.
... building healthy marriages through
natural family planning

July 12, 1988

Richard J. Bennett
10 Maple Drive
North Caldwell, NJ 07006

Dear Mr. Bennett:

The case of Fordham University versus Phyllis Zagano has dragged out now for over five years, and I ask of you that as a trustee of Fordham you instruct Father O'Hare to reappoint Professor Zagano and to stop the stalling on the legal hearings. I want to quote what I wrote to Father Joseph A. O'Hare on October 5, 1987.

"Over the last 25 years I have seen ample indications of middle management problems within the Church, but the fact that your situation is not unique does not make it any less unjust. I suspect that someplace in the Constitution of Fordham University is some lofty statement about the pursuit of truth and justice, maybe even something about the development of personal character along Christian lines. But in your middle management you have someone who writes for a pornographic magazine and then from that perspective blocks the re-appointment

of a qualified person who is known to support the teaching of the Roman Catholic Church. Such prejudice and discrimination would be intolerable at a secular university; it should be unthinkable at a University that still chooses to be thought of as somehow Catholic. With all the talk about peace and justice in the world today and especially in the American Church, how can it be that you allow so much injustice and unrest in the case of Phyllis Zagano?"

Pope Paul VI coined the phrase "Justice is another name for peace." By the same token, injustice is the primary cause of discord and war. Injustice is of two types - substantive and procedural, and Fordham appears guilty of both by the initial firing (technically non-reappointment) and by stalling in an apparent effort to wear down the suppliant. Well, what if you should succeed in breaking her? What if you cause something within her to snap? Will you then be satisfied? Will you then congratulate yourself that Fordham did rightly by not renewing her contract because, after all, anyone who can't take 5, 7, 10 years or whatever of psychological warfare shouldn't be allowed to teach at Fordham?

The next time you read a survey showing that people don't trust big business management, you have only to look in the mirror to discern why. During these past few days, the prophet

Hosea has been read at Mass, and his talk about the rich and powerful grinding the weak into the ground is all too applicable to the present case.

I know not if you are Catholic or care a whit about Catholic teaching, but if your going to be a trustee of a nominally Catholic institution you should know at least this much: the purpose of all Catholic teaching about social justice is to secure justice and peace for the individual person. Even if you should believe that Ms. Zagano received substantive justice by being de facto fired, do you in the depth of your heart believe she is receiving procedural justice by the University dragging this matter out for over five years?

Justice is another name for peace. Please act accordingly.

Sincerely,

FORDHAM UNIVERSITY
BRONX, N.Y. 10458

Office of
THE PRESIDENT

Dr. Phyllis Zagano's Quarrel with
Fordham University

The decision not to reappoint Dr. Phyllis Zagano, when her contract as an assistant professor in the Department of Communications expired at the end of the school year 1983-84, was made in the spring of 1983. This decision was taken by the administration upon the recommendation of a departmental committee consisting of the then chairman and other senior members of the department. The deans of the Graduate School of Arts and Sciences and Fordham College concurred in that recommendation.

During the last year of her contract, 1983-84, Dr. Zagano appealed this decision directly to the administration and through various faculty committees. The administration asked her department to review her case once again. The department did so and again recommended against reappointment, by an even stronger margin. A second faculty committee that reviewed the case found no reason to amend or set aside the decision not to reappoint her. Similarly, the faculty grievance committee that reviewed her case concluded that there had been no

violation of Dr. Zagano's academic freedom.

Peer evaluation is an essential part of decisions made concerning faculty members at American academic institutions. It is not uncommon for faculty members who are denied reappointment or denied tenure to claim that one or another form of bias influenced these evaluations. As a result, universities are continually involved in litigation with former faculty members who claim that the decisions made in their cases were the result of one or another kind of bias--racist, sexist, religious, ethnic, etc. Dr. Zagano's case is somewhat novel only because of the grounds on which she charges bias; she claims that the then chairman of her department told her that she would not be reappointed because she was "too involved in Catholic matters and affairs."

If this were the case, it would be a strange anomaly, since Fordham University is proud of its Catholic heritage and Catholic identity. Dr. Zagano's account of her conversation with her chairman, however, is disputed by the only other participant in that conversation. Whatever the truth of this dispute, other members of the departmental committee that recommended against her reappointment would deny most vigorously that such considerations entered into their judgment. I should point out that the same department, which included two senior members who are Jesuit priests,

recommended for tenure at approximately the same time another Catholic woman.

Dr. Zagano's case is now being heard in several different Federal and State tribunals. I cannot comment on these proceedings, but I should point out that the determination of the New York State Division of Human Rights that Dr. Zagano cites was a very preliminary ruling that merely provides that a hearing be held on her claim. To date, there has been no finding in any tribunal that the charges made by Dr. Zagano have any validity.

Along with pressing her case in these various tribunals, Dr. Zagano has also been engaged in a campaign to discredit the University by focusing attention on Dr. George Gordon, who was the chairman of her department at the time the decision was made. She points to the fact that some of Dr. Gordon's research before he came to Fordham was questionable and that during the summer and fall of 1983, he published three short op-ed pieces in Screw magazine. She also claims that I have defended Dr. Gordon's publication in Screw as an exercise of academic freedom.

The presence of Dr. Gordon at Fordham is, of course, an entirely separate matter from the question of Dr. Zagano's qualification for reappointment. Nonetheless, I hasten to provide some clarifications about Dr. Gordon since Dr. Zagano has persistently attempted to make him the central issue. Dr. Gordon was

hired as a full professor with tenure in 1981. His extensive publication record up to that time was available to those faculty members who considered his appointment, and one of these was Dr. Zagano herself. When his op-ed pieces in Screw magazine came to the attention of the University administration in the fall of 1983, Dr. Gordon was told that his choice of publication was offensive to many administrators and faculty at Fordham University. Since that time, no further writing by Dr. Gordon has appeared in Screw magazine.

When I assumed the office of President in July 1984, the issue of Dr. Zagano's reappointment was being reviewed by a special faculty committee. A few weeks later, I received the report of that committee indicating that it had found no justification for Dr. Zagano's claims of bias. I accepted the finding of that committee. I saw no reason to reopen a case that had been reviewed several times by the previous administration and various faculty committees.

A year later, in summer of 1985, the issue of Dr. Gordon's publication in Screw magazine once again became public, as Dr. Zagano sought to identify the issue of her own reappointment with the question of Dr. Gordon's suitability to teach at Fordham. The issue of Dr. Gordon's choice of publication in 1983 had been addressed in a reasonable way, it seemed to me, by the previous administration in January 1984. I saw no

reason to reopen this case a year and a half later, particularly when our University counsel points out that Dr. Gordon's choice of publication would probably not be considered by American courts sufficient ground for the dismissal of a tenured professor. While I would not and did not defend Dr. Gordon's choice of publication as a legitimate exercise of academic freedom, I recognized that many others would. Furthermore, I have seen no evidence in the three years that I have been President of anything less than professional conduct on the part of Dr. Gordon. In fact, from time to time I receive from students and faculty unsolicited expressions of respect for his teaching and other contributions to the University.

I look forward to the resolution of this controversy in the various tribunals in which it is being judged. Such a resolution would make it possible for Dr. Zagano to get on with her life and for the President of Fordham University to turn his attention to more interesting and more constructive projects than repeatedly rehearsing a dispute that took place four years ago, before I had assumed the office of President. Meanwhile, I regret that this unhappy episode has been the occasion for the dissemination of so much misleading and mistaken information about Fordham.

Joseph A. O'Hare, S.J.
September 1987

TRANSCRIPT OF DISTRICT COURT PROCEEDINGS
MARCH 15, 1989

[11] THE COURT: Any indications of vexatiousness. I [12] don't know what the good judge in the Eastern District -- who was it?

MR. POTH: I think it was a magistrate, your Honor.

THE COURT: A magistrate?

MR. POTH: I'm pretty sure it was a magistrate. Shinewein.

THE COURT: A district judge made that the order of the court and got it published in West, is that what it amounts to?

MR. POTH: I don't know. The Federal Reporter shows a magistrate's decision, your Honor.

THE COURT: Whatever the word "indications" means, if you read, as I skimmed through the various letters that President O'Hare has annexed to his affidavit, you certainly get a strong flavor, arguably, of vexatiousness. Those letters are --

MR. POTH: Your Honor, have you read parts of our reply memorandum?

THE COURT: No, you tell me about that.

MR. POTH: Shall I do that now?

THE COURT: Letters to the faculty,
to the alumni --

MR. POTH: Not only to faculty.

THE COURT: "I want money to pursue this [13] principled case in the federal court. I have filed a civil suit in the federal court and, alumni, I need help in my legal expenses to pursue this principled case," which is our case. I assume she got a kitty from some people.

MR. POTH: It wasn't a kitty, your Honor. She got a very small amount of money.

THE COURT: A very small pussy cat.

MR. POTH: Indeed, sir.

THE COURT: She is really going after him. She says this guy Gordon is outrageous for writing the Screw Magazine.

MR. POTH: I couldn't agree more.

THE COURT: Is that not vexatious to write such things to the alumni of the college?

MR. POTH: I will point out two things. It so happens that I spent some time as staff counsel of the American Civil Liberties Union and I have some familiarity with Freedom of Speech

cases. This to me is a prime example, and the words in the defendant's -- I guess it is in Father O'Hare's affidavit, that these people, the alumni, were recipients of her provocative material, that's what Voltaire and Thomas Paine were always accused of.

THE COURT: Maybe they were vexatious, too, in the name of Freedom of Speech, and protected.

MR. POTH: As an ex civil liberties lawyer, I [14] don't agree with the union on everything it does today, to settle that question, but it still is a constitutional right we have to protect.

THE COURT: Explore possibility in good faith.

MR. POTH: There is a New York Times editorial, don't read it now, but would you read it at sometime, that hits the nose exactly. It is this miserable program I have never seen that some woman complained to the radio stations that it was terrible and the advertisers apparently took heed.

The New York Times points out that exactly, that that is exactly what it should be. It says if the advertisers hereto translate that to the alumni, particularly the most generous givers, if they choose to heed such protests that's their business, and this is the whole purpose of free speech. This is one area in which I do have some expertise.

THE COURT: I couldn't agree with you more. I do not disagree with you at all, but the University at this point is saying we want these issues resolved to get this behind us.

MR. POTH: That's another issue, sir.

THE COURT: And that's what they are saying. Now, they may lose the case, they may win the case, but they say, we are tired of these letters, we are tired of alumni [15] writing to the president saying, "Am I going to have to split my gift to Fordham next year between the University and Phyllis Zagano's defense fund?"

MR. POTH: I thought all of those reply letters that Father O'Hare included were excellent letters.

THE COURT: They were, but the University wants the issue resolved.

MR. POTH: The ones that came back I thought were great.

THE COURT: They are fine letters, but they want a resolution.

MR. POTH: If I could finish. I agree with you, but it so happens that the University never raised the question of hurry or speed for going to trial immediately in this case until late December of last year.

Ms. Soyster, and I am not saying this critically at all, joined with me, or acquiesced, in the filing of, I don't remember at this point how many requests for adjournment of pretrial conferences, your Honor, that you had set.

There was never any complaint either by this court or by Ms. Soyster until late December when I asked Ms. Soyster, "What should we do about the federal court case? Shall we adjourn it again?" and she said, "No," and that was the first time we really started to press forward.

[16] So if we are talking about delay, Judge, delay is a factor only post December 15, whenever the last settlement conference was.

THE COURT: This letter writing campaign I gather began last fall?

MR. POTH: It goes back much further than that.

THE COURT: Some of the letters here seem to be October.

MR. POTH: Could be, yes. I have not seen, obviously, all the letters that my brother --

THE COURT: They are in the papers.

MR. POTH: I know. Before I had not seen all of the letters that my client, who tends to do things on her own, had

written, and I'm sure she has written a lot more than just the ones that are there.

THE COURT: This starts off, to Richard Bennett, trustee, "The Phyllis Zagano case has dragged out five years, as of 1st July. I ask you as trustee to instruct the president to reappoint her and stop stalling on the hearings. That stinks."

If I was trustee of the University I would be saying to O'Hare, "What's up?" And at that point he would call up his lawyer and say, "What's up?" And at that point she comes into the courtroom and says, "I want a trial."

MR. POTH: What was the date of that letter, your [17] honor?

[28] THE COURT: Do you have any of those letters to you?

[29] MR. SOYSTER: I have one of them with me.

THE COURT: May I see it, please?

MR. SOYSTER: Certainly. It is a letter to the academic vice president of Fordham which describes my bad behavior.

THE COURT: Who is Reverend Potter?

MR. SOYSTER: He is the academic vice president of Fordham and one of my primary contacts in terms of legal

representation of the University.

(Pause)

THE COURT: Mr. Poth, have you looked at the second paragraph of this thing?

MR. POTH: It shocks the hell out of me.

THE COURT: The second paragraph says, "If there is no negotiated settlement and the case goes to court, and Phyllis Zagano's lawyers are ready to go to court" -- here we are.

MR. POTH: Your Honor, I have nothing to do with this letter whatsoever. I am shocked by it. Patrick Heelan, who is a name fresh to me in any event --

THE COURT: He obviously is not writing this having made it up out of thin air. This is not rain that fell on his head, somebody gave him this information.

MR. POTH: I am shocked by it myself.

THE COURT: Where did he get this information? [30] From Mrs. Zagano?

MR. SOYSTER: I know where he got it: Dr. Zagano, of course. The chronology he refers to as if it is an official document which she prepared.

MR. POTH: It says at the bottom, "copies of other papers that Dr. Zagano

sent me. Best wishes for the New Year." Father Heelan, who is a Jesuit, Judge, I believe is or was Dr. Zagano's -- help me on this factually if you know -- superior or department head when she, Zagano, was a teacher or an assistant professor, whatever her title was, at the Stony Brook campus, where Heelan is.

MR. SOYSTER: More to the point, though, your Honor, is the fact that Father Potter is a philosopher and now the academic vice president of Fordham. These are professional colleagues and very serious allegations, and I might add, I hope unnecessarily, entirely erroneous allegations are being made from someone who is a person you normally would take seriously. This is the kind of thing.

I didn't put these on the paper because what is happening to me is not an issue. What is happening to Fordham and to Father O'Hare is an issue.

THE COURT: No, but this is relevant, it seems to me, if credited, on the issue of whether or not Dr. Zagano has a right at this point to drop this suit and walk away from it without cost to her but a terrible cost to you, and [31] it is certainly some evidence -- Voltaire, vexatious as he might have wanted to have been, would have recognized that this is defamatory, and therefore not privileged by the First Amendment.

MR. POTH: I'm not sure of that, your

Honor. There is a lot of case law on that one.

THE COURT: You cannot go around saying that a lawyer is lining her pockets and is a liar to the president of the University.

MR. POTH: Your Honor, I was merely speaking to the First Amendment question. As I said twice before, this shocks me, shocks the bejesus out of me.

THE COURT: In any event, I am marking this exhibit as Court's Exhibit 1 this date, being a letter of Patrick Heelan, State University StonyBrook, dated January 12 of 1989, to Reverend Vincent Potter, Fordham University. We will put a tag on that.

(Court Exhibit 1 marked for identification)

THE COURT: It seems to me that this is based upon something obviously that Mrs. Zagano --

MR. POTH: It says so here.

THE COURT: -- furnished him and told him and exhibits a state of mind in several directions, including the fact that she purports to say that she wants to go to trial today.

[32] MR. POTH: I don't know that it says that.

THE COURT: Paragraph 2: "Phyllis Zagano's lawyers are ready to go to court." You may not be ready to go to court, but she is.

MR. POTH: Judge, I'm not too sure that's any more accurate a statement than anything else that I read in this particular piece of paper.

MR. SOYSTER: If I could continue
. . . .

[44] THE COURT: Now these letters to the trustees, to the alumni, to the president, to Mr. Heelan, asking him to write further --

MR. POTH: From Mr. Heelan.

THE COURT: No, she sent him a chronology and [45] other things, I assume there was an accompanying letter saying, "Patrick, write me a letter, do me a favor."

MR. POTH: I thought you said this letter.

THE COURT: -- creates certainly a circumstantial prima facie case that she is using the publicity of this to further her goals in what we all could conclude, if we get down to Heelan's letter, is a wholly impermissible way. You don't go around calling the adversary lawyer a liar and this and that and the other.

MR. POTH: I agree with that

absolutely.

THE COURT: My question to you is, at some point, and I want to quickly say to you, there is an attorney/client privilege here that you may wish to assert, but I would like to know what she said to you about why she is not going forward today.

You probably said to her, "Phyllis, this judge Owen, I have been before him, he is awful hard nosed about this thing. He has set this trial day, he has told me we are going, and I am telling you that there is a risk here that he is going to chuck this case out."

I am not asking you to tell me that that was what was said, but that's a conversation that probably happened.

MR. POTH: Obviously I can't say that or even nod my head, but I'm going to tell you something else, sir, I have been trying for sometime to convince her that we ought [46] to file a motion to dismiss. I probably should have --

THE COURT: Why didn't she?

MR. POTH: Could I finish, your honor?

THE COURT: Do you want to tell me what she said or do you not want to tell me?

MR. POTH: Obviously, I cannot,

because of the attorney/client privilege, tell you what she said, no.

The next thing in my notes is I was going to tell you what exactly happened.

THE COURT: Did she say anything to you that was to be communicated to me? Because then there is no longer a privilege.

MR. POTH: No, Judge, she certainly did not.

THE COURT: Did she say, "You tell the judge so and so and so and so," and if she said that, obviously there is no privilege.

MR. POTH: She likes you, Judge, so she did not say anything of that sort, to be transmitted to you.

THE COURT: My question is, if she wants to go forward, here is the day.

MR. POTH: Your Honor, if I could finish I think I can answer what you are asking.

I endeavored to persuade her for some time, and I will claim fault on my part in this, I should have done it sooner, there is no doubt. I suppose early January --

Stony Brook
Department of Philosophy
State University of New York at Stony
Brook
Stony Brook, New York 11794-3750

January 12, 1989

Reverend Vincent Potter, S.J.
Fordham University
Bronx, NY 10458

Dear Vinnie,

I am enclosing the Chronology of the Zagano-Fordham case which shows that the unconscionable five and a half year postponements are due to Fordham's lawyer, not Zagano's. The profile of the postponements suggests to me the following conclusions: 1. that the lawyer is lying in what she has told the President and others about the cause of the delay; 2. that her strategy is to consume the resources of the plaintiff; while 3. in a self-serving way, racking up legal fees for herself. The consequences are that, if and when the case comes to a negotiated settlement, Fordham will look worse and will have to pay more for the more extended period of personal injury.

If there is no negotiated settlement and the case goes to court--and Phyllis Zagano's lawyers are ready to go to court--her side will try to prove that the atmosphere of the Communications Arts Department was polluted against women

(track record of hirings, public reputation in her profession, personal conduct of members of the Dept., all male, including Jesuit, ex-Jesuit, anti-Jesuit, and non-Jesuit), against the Catholic Church and Catholic morality (Screw magazine; Gordon's Erotic Communications, etc.), and against the military of the USA (whatever it is, the military are supporting it). As I said to you, this is not an anti-Fordham case but an anti-Communications Arts Department case.

Having looked at the chronology of the case, what it suggests to me is that the Fordham lawyer has not served Fordham well, that the Fordham lawyer may be incompetent, that she may be self-serving, and that she may have misinformed the President about the substance and handling of the case in order to defend her own personal stake in the proceedings. These are just the hunches of one who has been involved in similar cases. I think it would be in Fordham's interest to have the handling of the case reviewed by a different lawyer and one in whom Fordham has confidence. But above all, everybody has a stake in a speedy resolution.

I am enclosing a copy of the Chronology and copies of some other papers that Phyllis sent me. Best wishes for the New Year!

Yours sincerely,
/s/ Patrick SJ
Patrick A. Heelan, S.J.

